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SUBJECT: BRAZIL: SPECIAL 301 RESPONSE

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SENSITIVE BUT UNCLASSIFIED

1. Summary. Post recommends that Brazil remain on the Priority Watch List for the 2003 Special 301 Review. New attention to entrenched IPR problems, particularly in the copyright area, may be forthcoming under the new Lula government. Driven largely by concern over lost tax revenues, impact on formal sector jobs, and harm to Brazilian artists, the new administration, which assumed office January 1, has publicly acknowledged rampant piracy and counterfeiting to be a Brazilian problem, and has vowed action. However, it is too early to assess the GOB's new level of commitment. Furthermore, despite some positive groundwork laid by the Cardoso administration, the level of IPR enforcement within Brazil remained grossly inadequate during the last year. Despite its new leadership and staffing, the Inter-Ministerial Committee for Fighting Piracy (IMC) has not yet proven its capacity for effecting substantial, tangible improvements in copyright enforcement. Likewise, the backlog of pharmaceutical patents continues to grow due to the two-step patent application process, which requires Ministry of Health approval, and insufficient resources within Brazil's patent institute. Maintaining the status-quo on Special 301 status for Brazil strikes the appropriate balance between recognition of a continued poor IPR record, hopes that the new government will tackle the issue in earnest, and reinforcement of the USG message that IPR remains a priority within our bilateral agenda.

Copyright - The Groundwork

- Inter-Ministerial Committee: An Enigma or Force for Change?

2. As IIPA notes in its submission, much stock was placed in the creation of the Inter-Ministerial Committee to Fight Piracy (IMC) in March 2001. There was an expectation that the IMC would provide the vehicle through which the GOB could finally articulate and act on a national strategy for copyright enforcement. However, far from being a dynamic force for change, the IMC was not a functioning entity in 2001. Even GOB officials have acknowledged the IMC's less than stellar 2001 performance, during a November 2002 Bilateral Consultative Mechanism meeting and more recently in meetings with DOC A/S Lash on February 27. While copyright industries are correct in asserting that tangible results still remained elusive in 2002, the following changes in the IMC should be noted as having positive potential.

3. In March 2002, a new coordinator, Clovis da Silva Monteiro, was named to head the IMC. Monteiro was tasked solely with running the IMC, in contrast to his predecessor, who had retained his drug-fighting responsibilities as a senior police official in Rio de Janeiro during his IMC tenure. Monteiro established within the Ministry of Justice an IMC office staffed with four assistants, and had managed to convene 10 IMC meetings by the end of 2002, many with private sector representatives. In November 2002, the IMC produced an action plan for 2003 (USTR received a copy during the Bilateral Consultative Mechanism meeting the same month).

4. The action plan, a nine-page document, on first read appears to suffer from over-generality; actions are only described in broad terms. For example, one action item is to examine existing proposals for legislative reform and to identify the need to improve other legal texts. The item fails to provide IMC views on specific IPR legislative proposals or to identify actions to promote their adoption or defeat. This generality, at least in part, reflects the fact that the IMC is a coordinating body) it does not have the authority to direct action by any other government body.

5. As explained by Elza Marcelino de Castro, chief of

Itamaraty's Intellectual Property Division and Itamaraty's representative to the IMC, specific actions are not identified in the IMC action plan because implementation is the responsibility of the individual ministries that comprise the group. She notes, for instance, that after IMC discussions and consensus, Itamaraty recently sent a note to the Brazilian Congress urging action on long-pending legislation on integrated circuitry. She also claims that an action plan with greater specificity exists, but is not public. Likewise, it is difficult to find the imprint of the IMC on police enforcement actions. Monteiro, who hails from the Federal Police corps, claims to be intimately involved in promoting and coordinating police activity country-wide. He admits, however, that he generally obtains results more from drawing on his personal credibility and experience within law enforcement than as head of the IMC.

¶6. Monteiro has apparently succeeded in elevating IPR as an issue within Mercosul. Due to his efforts, IPR was included for the first time within a Mercosul Presidential Declaration during the group's summit in Brasilia in December 2002. Itamaraty has confirmed that the issue is on the Mercosul agenda for follow-up at the ministerial level. Brazil's actions in this regard are driven by its concern over pirated materials being smuggled across its borders, principally from Paraguay.

¶7. Another action under IMC discussion is formation of a task force to deal with counterfeit products. In a conference on IPR enforcement held in Rio de Janeiro in late November 2002, tax losses and potential harm to consumers from counterfeit products figured prominently. A representative of Receita Federal, the GOB's IRS, was quoted extensively on the substantial tax losses from counterfeit products, principally cigarettes and gasoline. Given the federal government's tight budget situation and focus on tax issues, greater GOB attention can logically be expected in this area during the coming months.

¶8. The Ministry of Justice is reportedly looking into the possibility of forming a task force comprised of representatives from the country's various police units. This would be a welcome complement to the more policy-oriented IMC. Monteiro also claims that the IMC is encouraging other municipalities to establish IPR task forces, similar to Sao Paulo's, but admits that convincing local authorities with tight resources that investments should be made in this area is an uphill battle.

¶9. An area of increasing focus by some of the copyright industries is Brazil's judicial system, in particular, the lack of convictions and of deterrent sentencing. According to Itamaraty's de Castro, while establishment of separate IPR courts is not envisioned, the IMC is discussing how to cultivate IPR expertise within the judicial system. She notes, however, that executive branch initiatives in this area are not always welcomed by the independent judiciary.

¶10. While the IMC's lack of overarching authority will continue to undermine its ability to forcefully carry out a nation-wide strategy for improving IPR protection within Brazil, it still represents the best vehicle at present for focusing IPR enforcement issues at the federal level. Private sector associations interested in IPR issues are seeking increased involvement in the work of the IMC, with some requesting a seat on the committee. Enhanced involvement in the IMC by the private sector could lead to better focus and more concrete results.

-Optical Media: New Digital Codes Requirement

¶11. The promulgation of Presidential Decree 4533 on December 19, 2002 provides implementing regulations for Article 113 of Brazil's 1998 Copyright Law concerning identification codes for copyright products. The decree requires that music and audiovisual works, whether optically read or not, include codes identifying the original work, the production company, catalogue number, the lot code and number of copies contained within the lot, as well as an International Standard Recording Code providing information on the respective artists and other information provided by the producer. The decree is due to become effective April 22, 2003. Local industry is divided on whether or not this requirement will prove to be an effective IPR enforcement tool, or merely a mechanism for better accounting between production companies and artists. The local software industry association (ABES), for instance, opposes the decree. However, Castro argues that the decree will help reduce illegal sales of works that are stolen from legitimate production facilities, which she claims have been significant.

Patents) No Recovery Expected Soon

¶12. Despite GOB officials -- such as the acting head of Brazil's National Institute of Industrial Property (INPI), Minister Furlan who oversees INPI as the head of the Ministry

of Development, Industry and Trade (MDIC), Under-Secretary Hugueneu of Itamaraty's U/S of Integration, Economics and Trade, and Senator Mercadante (PT)- recently acknowledging the magnitude of the problem, no immediate reduction in the pharmaceutical patent backlog is expected. Firm figures on INPI's pending patent applications are hard to come by, but PhRMA's estimate of 45,000 pending patent applications, of which approximately 18,000 are pharmaceutical patents, appears reasonable.

¶13. INPI claims the backlog is due to its lack of resources; INPI currently has 80 examiners and only a few computer terminals. INPI has requested approval from the central GOB to hire 350 examiners over the next five years and expand its number of computers. However, the government's tight budget situation casts doubt on the likelihood of this occurring. Even Itamaraty's de Castro admitted to econoff that without a dramatic increase in resources for INPI, the patent backlog will persist for many years. INPI is currently training 27 new examiners, 20 of which will reportedly focus on pharmaceutical patents. The required approval of the Ministry of Health's regulatory agency, ANVISA, in addition to raising TRIPS compliance concerns, also adds to patent processing uncertainty and delays. However, in a February 27 meeting with DOC A/S Lash, Hugueneu reported that the GOB will be initiating a review in March of its policy regarding ANVISA's role in the patent approval process.

Biotechnology

¶14. As noted in the American Soybean Association's (ASA) Special 301 submission, piracy associated with Roundup Ready has been a burgeoning trend. Past denial by the GOB of the existence of illegal plantings of Roundup Ready, which is estimated to have reached as high as 70 to 90 percent of the soybean crop in the state of Rio Grande do Sul, has hindered Monsanto's ability to exercise its patent rights. The Lula administration has recently recognized the widespread use of Roundup Ready and is deliberating on what to do about the "illegal" GMO plantings within the 2002-2003 crop. It is unclear at this point to what extent if any this acknowledgment of the pervasive use of Roundup Ready will assist Monsanto in pursuing its patent claims.

TRIPS Compliance: Data Confidentiality

¶15. On December 17, 2002, the Brazilian Congress passed Law 10,603 intending to bring the data confidentiality portions of the industrial property law fully in line with TRIPS. The law provides data protection for 10 years from the date of patent registration for products utilizing new chemical molecules or new biological organisms or until the first release of the information by the patent holder, with a minimum guaranteed period of protection of one year. For products not utilizing new molecule or organisms, the period of protection is five years or until the first release of information by the patent holder with a one-year minimum period of protection. For data generated after patent registration, the period of protection will coincide with the patent period or one year from when the data was divulged, whichever is longer. USTR is evaluating whether or not the legislation is TRIPS compliant.

Treaty Ratification

¶16. Itamaraty has confirmed that the GOB does not currently have plans to ratify the 1996 WIPO Copyright Treaty or the WIPO Performances and Phonograms Treaty.

Recommendation

¶17. Post believes that the lack of tangible improvements in IPR protection and enforcement in the last year manifestly precludes lowering Brazil's Special 301 status. We concur with industry submissions that suggest that retaining Brazil as a Priority Watch List country will appropriately highlight for the new government the importance of the issue in our bilateral relationship, without appearing to prejudge its policies and actions in this area. Nonetheless, we request that, should Brazil's status be maintained, USTR's announcement highlight the USG's recognition of the positive intentions expressed by the Lula administration regarding IPR and the USG's desire to work collaboratively with it to improve its IPR regime in the coming year.

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